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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 418

JEROME F. DUGGAN, TRUSTEE OF THE ESTATES OF CHRISTOPHER ENGINEERING COMPANY, AND NATIONAL AIRCRAFT CORPORATION, *Petitioner*,

vs.

JAMES C. SANSBERRY, TRUSTEE OF THE ESTATE OF NATIONAL AIRCRAFT CORPORATION.

No. 419

NATIONAL AIRCRAFT CORPORATION, *Petitioner*,

vs.

JAMES C. SANSBERRY, TRUSTEE OF THE ESTATE OF NATIONAL AIRCRAFT CORPORATION.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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INDEX.

INDEX.

TABLE OF CASES.

INDEX.

STATUTES CITED.

TEXTBOOKS CITED.

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MOTION TO SUPPRESS.

Come now the petitioners and show to the Court that respondent, in violation of the rules of this Court, and in violation of the Constitution of this Court as a court of review, has incorporated in his Brief as "Appendix B" (pp. 55-92, inclusive) numerous exhibits which are

not included in the complete transcript of the record of the court below as certified by the Clerk of the court below and on the basis of such purported exhibits has submitted numerous arguments calculated to influence the conclusions of this Court on the merit of petitioners cause.

And petitioners show to the Court that the said exhibits were not at any time offered in evidence before the Referee in the lower court or before the Judge on review of the Referee's order involved in this cause and that these petitioners have never at any time been accorded a hearing on the competency or relevancy of said exhibits or their materiality to the issues involved in this case and have not at any time been afforded an opportunity to contest or dispute the competency or legal effect of said exhibits or to rebut or explain the same.

As a result of all of which these petitioners show to the Court that the ex parte attempt of the respondent to supplement the record constitutes a departure from the accepted and usual course of judicial procedure and operates to deprive these petitioners of due process of law against the guaranties of the Fifth Amendment to the Constitution of the United States.

That insofar as respondent has incorporated said purported facts and evidence contained in said exhibits in his argument, he has violated Rule 27 of the rules of this Court in that, being unable to appropriately page such references to the printed Record, he has paged them to the purported appendix of his Brief or on occasion availed himself of purported inferences therefrom without reference of any kind.

Wherefore, the petitioners move the Court to suppress and disregard the matters and things contained in said "Appendix B" and the references thereto wherever found in respondent's Brief.

JEROME F. DUGGAN, TRUSTEE etc.
and
NATIONAL AIRCRAFT CORPORATION,
Petitioners.

By

Their Attorney.

SUMMARY OF THE ARGUMENT.

In our reply argument we have followed the paragraph headings of the respondent's Brief with references to the pages of the respondent's Brief to which the argument and comment is directed, followed by a discussion of the particular cases cited by the respondent. So treated, our reply argument cannot readily be summarized except by following the summary contained in respondent's Brief, which is already before the Court. For this reason we have omitted a formal summary.

PETITIONERS' ARGUMENT AND COMMENT ON RESPONDENT'S BRIEF.

(Paragraphing and paging is to Respondent's Brief)

Foreword.

This cause was tried before the Referee below on the Trustee's Report of Sale (R. 39). The Report recited that before the sale commenced the Trustee and his auctioneer were served with a copy of the judgment order of the Missouri Court approving the subsidiary petition of

National Aircraft Corporation for a reorganization in connection with the reorganization of its parent, Christopher Engineering Company (R. 41). A certified copy of the judgment order was attached to the Trustee's Report as Exhibit A (R. 41).

The hearing on the motion to confirm the sale was had on the report and an inquiry as to the adequacy of the sale and consideration.

No inquiry or hearing was had on whether or not the National was a subsidiary of Christopher or on the probability of successful reorganization, except as that question was determined by the judgment order of the Missouri Court. No other evidence bearing on the issues in this case was offered before the Referee and the sale was confirmed upon the Referee's conclusion that the respondent held title to the assets as trustee in bankruptcy; had possession of the property; and that no application for the release of the assets had been filed in the Indiana Court. From these facts the Referee concluded that the sale should be confirmed on ordinary considerations.

The entire proceeding is set out on pages 3 and 4 of the Record. It contains no finding as to the probability of reorganization or as to the stock ownership or subsidiary relationship of National for the very good reason that these issues were not tried on extraneous evidence.

On that order and record we applied to the Circuit Court of Appeals for the Seventh Circuit for prohibition, as mentioned by the respondent on page 8 of his Brief.

Following the same practice that he has followed in this Court and in the Court below, the respondent

gathered up various unrelated documents from the files of the Court in St. Louis and incorporated them in his Brief in opposition to the petition for prohibition without giving us any opportunity to be heard on the documents, to rebut, deny or explain them.

At some time subsequent to his findings and order dated May 3, 1944 (Record, pp. 3 and 4), which are summarized in the preceding paragraph, and after the petitioners had filed notice of appeal, assigning as grounds therefor that the Referee was without jurisdiction to enter the order because his jurisdiction over the assets had been superseded and vested in the Missouri Court and Duggan, as Trustee in reorganization by the order of the Missouri Court dated April 19, 1944 (Record, p. 51), the Referee incorporated in his certificate on review a certain summary of evidence (Record, p. 6) purported to have been heard at a first meeting of creditors on March 7, 1944, and a certain summary of a hearing held on January 24, 1944, and before the National was adjudicated a bankrupt, on the petition of a creditor for the appointment of a receiver, together with purported findings of fact made by him on that hearing and dated February 1, 1944. In addition the Referee incorporated certain "Findings of Fact" which did not purport to be based on any evidence heard by him on the hearing on the motion to confirm the sale and in these "findings" for the first time concluded that the capital stock of the bankrupt corporation was the property of J. M. Brown and A. B. Christopher and said bankrupt corporation was not a subsidiary of Christopher Engineering Company (Record, p. 16).

No additional evidence was heard by the District Judge on review, but the certificate of the Referee was neces-

sarily included in the transcript of the evidence prepared for the Circuit Court of Appeals.

Of course the transcript did not include the so-called exhibits, incorporated by the respondent as an appendix to his Brief herein, for the reason that the said exhibits were never offered in evidence before the Referee. In fact, most of the so-called exhibits indicate on their face that they were not so offered and respondent concedes as much (Resp. Brief, p. 55).

Exhibit No. 1 (Resp. Brief, pp. 56-64) is certified by the Clerk of the St. Louis Court as of May 19, 1944, seventeen days after the hearing was had before the Referee.

Exhibits No. 2, No. 3, No. 4, No. 5 and No. 6 are certified by the same Clerk as of May 19, 1944 (Resp. Brief, p. 76).

Exhibits No. 7 (Resp. Brief, p. 77) and No. 8 (Resp. Brief, p. 80) are also certified by the same Clerk under date of May 19, 1944.

Exhibit No. 9 (Resp. Brief, p. 83) was certified by the same Clerk on January 5, 1945, eight months after the hearing, and Exhibit No. 10, with Exhibits A and B attached, purporting to be proof of claim of J. M. Brown in the Indiana Court, was certified by the Clerk of that Court on the third day of February, 1945. The last named claim was not filed in that Court until September 2, 1944, and recites that it was filed with the reservation of Brown's objections to the jurisdiction of the Indiana Court and was filed for the purpose of protecting and preserving his rights until a final determination of the jurisdictional question involved was had (Resp. Brief, p. 87).

Notwithstanding that the record had been made up and certified in accordance with the rules for appellate procedure, the respondent, precisely as he had done in his Brief in opposition to our petition for prohibition and precisely as he has done in this Court, incorporated either the same purported exhibits or other exhibits in his Brief on the merits and, because of the limited time allowed the appellants, we were unable to supply a Reply Brief. At the trial the respondent, over the protest of petitioners' counsel, argued the so-called exhibits and drew inferences therefrom calculated, in the words of Judge Briggle, who dissented (Record, p. 102) to reflect upon the integrity of the findings of the Missouri Court.

Appellants' counsel did not apprehend that the Court of Appeals would consider these alleged facts de hors the Record. Judge Sparks, however, in his opinion (Record, p. 91) on the basis of these alleged facts and the alleged facts incorporated in his certificate by the Referee delivered an opinion which, again in the words of Judge Briggle, "is pregnant with a recital of facts reflecting upon the integrity of the findings of the Missouri Court, all of which I respectfully submit are irrelevant in the consideration of questions before us" (Record, p. 102).

In preparing our petition for certiorari to this Court we at first incorporated therein as another reason for the intervention of this Court the charge that the Court below had "so far departed from the accepted and usual course of judicial proceedings or had so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision" (Rule 38).

Upon consideration, however, it developed that no other Judge had concurred with Judge Sparks in the use he had made of the purported facts irregularly presented to the Court and we concluded that it would be an imposition on the time of this Court to undertake to convince it that it ought to issue its writ of certiorari to review a minority opinion, hence based our application on what we deemed important questions relating to the dignity of judgments of courts of the United States when attacked collaterally and to a proper construction of the Chandler Act with reference to the right of a subsidiary to file for reorganization before the Court in which its parent is being reorganized.

We are confronted with the same situation again in this Court and are in more or less of a quandary as to what we ought to do in the circumstances.

We realize that it would lead to intolerable confusion to permit counsel to be jumping up and down in an appellate court objecting to opposing counsel's departure from the Record in the course of his argument and no Court could permit it. Nevertheless, to stand silently by and permit such a departure might imply that we concurred in the departure. Reference to Judge Sparks' opinion indicates that he drew that conclusion. On a number of occasions in his opinion he reiterated the fact that the so-called evidence or "facts" were not disputed, overlooking the fact that since we had never been granted a hearing on the alleged facts and no provision is made in appellate procedure for disputing facts de hors the Record, we had never been given an opportunity in an orderly way to dispute the facts.

Judge Sparks in his opinion (Record, p. 95) in discussing the alleged facts said:

> "We do not discuss the facts about to be related for the purpose of showing that the Court in Missouri erred in deciding the merits of the petition but rather for the purpose of showing that it was without jurisdiction to enter such order."

Our distinguished and estimable opponents in their Brief precede the extraneous facts set forth in their Appendix B by the statement:

> "The proceedings included in this appendix are set forth for the information of the Court, for the reason that they were also before the United States Circuit Court of Appeals for the Seventh Circuit under the following circumstances."

and recite that they were included in respondent's Brief in the Court below "in order that the Court might have a more complete picture" (Resp. Brief, p. 55).

If we might for a moment follow the procedure of our opponent and indulge ourselves in facts off the record, we would say that there has never been any plausible way of maintaining that the Christopher Engineering Company did not own all the stock of National Aircraft Corporation, since the Circuit Court of the City of St. Louis, sometime before the Christopher petition was filed, decreed that Brown and Christopher held all the stock of National as trustees for the Christopher Engineering Company.

May we reiterate that we recite these facts not for the purpose of establishing that National either was or was not a subsidiary of Christopher on December 27, 1943, but for the purpose of demonstrating the fact,

which needs no demonstration, that ex parte and hearsay evidence which has not been tested in accordance with the rules of due process is absolutely worthless.

We therefore respectfully ask the Court to sustain our Motion to Suppress.

I.

Respondent argues I: "The Indiana Court had the right to determine from the facts in its own record that it had jurisdiction to confirm the sale of assets of National Aircraft Corporation made on April 20, 1944" (Resp. Brief p. 15).

On the authority, among other cases, of Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329; and Rippeberger v. A. C. Allyn Co., Inc., 113 Fed. (2d) 332, both of which cases were cited in our original Brief, respondent asserts:

> "It is axiomatic, under our Federal system, that a Court has the right to judge of its own jurisdiction." (Brief, p. 21.)

This principle, disregarded by the Court below, we have steadily urged. But upon what principle does respondent, and the Court below, deny that privilege to the Missouri Bankruptcy Court sitting in a reorganization proceeding?

We have never challenged the jurisdiction of the Indiana Court to rule upon respondent's motion to confirm his sales. Our complaint is that it erred in confirming the sale because on the face of the record before it its power to confirm the sale had been stayed and its jurisdiction to sell the property superseded by the jurisdiction of the Missouri Court. We have directly attacked the adverse ruling.

In the respondent's report and motion to confirm the sale (R. 38) he recited that he had been served with the judgment order of the Missouri Court (R. 41) approving National's petition for reorganization under Chapter X with its parent Christopher and restrained from proceeding with the proposed sale. He attached a copy of the Judgment Order to the Report of Sale as Exhibit A (R. 41). Accordingly, the Indiana Court had before it incontrovertible evidence that its power to confirm the sale had been stayed by a reorganizing Court:

> "Section 148. Until otherwise ordered by the Judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy * * *."
> 11 USCA-548.

It cannot be seriously urged that the Indiana Court was vested with an inherent jurisdiction which Congress could not impair or suspend or that the respondent had any personal and vested interest in the assets which survived the jurisdiction of the Court which appointed him or in the continuance of the ordinary proceedings in Indiana, which Congress was powerless to suspend. After all, the Indiana Court was a creature of Congress with a jurisdiction bounded by the Congressional will and respondent was merely its officer. Sitting as a Court in ordinary bankruptcy it could not complain that Congress had made its continued power to proceed subject to be stayed by another Court sitting as a reorganization Court under Chapter X, any more than it could complain that its orders could be vacated by a statutory Circuit Court of Appeals.

Under Article I of Section 8 of the Constitution, Congress is vested with sweeping power to establish uniform laws on the subject of bankruptcy throughout the United States and to constitute tribunals inferior to the Supreme

Court and prescribe their jurisdictions. Paraphrasing the language of the Court in Tilt v. Kelsey, 207 U. S. 43-56. It had the power (if not the duty) to provide a tribunal under whose direction the bankruptcy law enacted by it might be interpreted and carried into effect. It might exercise this power by conferring jurisdiction upon a single court or by dividing the jurisdiction among two or three courts. It might determine that the bankruptcy jurisdiction should be exercised exclusively in one or divided among two or more courts as it, the legislative arm of the sovereign power, might determine.

> "But somewhere the power must exist to decide finally, as against the world, all questions which arise in the settlement of the succession (in the reorganization). Mistakes may occur and sometimes do occur, but it is better that they should be endured than that, in a vain search for infallibility, questions shall remain open indefinitely."

Congress accordingly enacted the Chandler Act providing in Chapter X a comprehensive scheme for the reorganization of distressed corporations to be initiated by petition, voluntary or involuntary.

The sole limitation upon the right to invoke the jurisdiction of the Court, as distinguished from the right to the relief sought, is found in:

> "Section 126. A corporation * * * may, if no other petition by or against such corporation is pending under this chapter, file a petition under this chapter."
> 11 USCA 526.

Though Congress might have divided between two or more courts the jurisdiction to decide, **finally as against the world all** questions which might arise upon the initiation of a reorganization proceeding, it is certain that it

intended to confer exclusive jurisdiction upon a single Court, the Court in which the first petition under Chapter X was filed.

> "Section 111. Where not inconsistent with the provisions of this chapter, the Court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property wherever located."
>
> 11 USCA 511.

Accordingly, respondent conceding that it is **axiomatic** that a Federal Court has a right to judge its own jurisdiction, it would follow that the Indiana Court, sitting in ordinary bankruptcy, erred in going behind the face of the unambiguous judgment of the Missouri Court and denying its effect on **"facts"** either in its own records or extraneous thereto, inconsistent with the implications of the judgment.

Since our attack is direct and timely and not collateral, the judgment below may be set aside without doing violence to the principle which the respondent concedes **is axiomatic** and without examining the competency, relevancy and evidential effect of the other **"facts"** which respondent asserts were within the records of the Indiana Court or **"facts"** which by his industry he has irregularly supplied this Court, or the Court below, de hors the record and without according his adversaries an opportunity either to dispute or to explain.

A.

(Resp. Brief, p. 16)

Since the Missouri Court approved the petition of National before the sale was had in Indiana, it is not necessary to decide or discuss the question submitted by

respondent as to whether or not the Missouri Court had power, as an incident to its jurisdiction in the Christopher or parent proceeding to enjoin the sale of National's assets before the petition by National was filed.

In passing, however, it may be noted that under Section 2a (11 USCA 11a) bankruptcy courts are vested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction under the Act, and under Section 262 of the Judicial Code (11 USCA 377) the Missouri Court had power to issue such writs, agreeable to the usages and principles of law, as might be necessary for the exercise of its jurisdiction.

Cf. Remington on Bankruptcy, Vol. 10, Sec. 4405, p. 296; Sec. 4406, p. 300.

B.

Respondent urges that the Missouri Court order approving the National petition did not have the effect of staying the proceedings in Indiana because the Indiana Court had in its records "direct evidence and findings of fact that National was not a subsidiary" (Resp. Brief, p. 21).

In other words, respondent insists that a judgment of a Court of the United States which is authorized to and does enjoin a collateral proceeding, may not be given effect collaterally if the collateral court whose jurisdiction is stayed, has knowledge of facts from which it concludes that the primary court was wrong in its conclusions. And insists that in such case the collateral court may, in effect, review the legal and factual conclusions of the primary court and measure its conclusions against the weight of the facts within the knowledge of the col-

lateral court and deny or give effect to the judgment according to the weight of such "evidence."

The only trouble with the "**direct evidence and findings of fact**" purportedly in the possession of the Indiana Court is that they were not offered in the right court or in a court where the question "subsidiary vel non" was in issue and where their competency, relevancy and materiality could have been ruled upon and the alleged facts themselves rebutted or explained, or so far as that is concerned were not offered, were never offered in evidence in the proceeding for the confirmation of sale involved in this case, but were simply incorporated in his "certificate" by the Referee from his own memory or files. As pointed out by Judge Briggle in his dissenting opinion (R. 101) the question of stock ownership of National was never in issue in the Indiana Court and never became relevant in any court until the subsidiary petition was filed in the Missouri Court and

> "I therefore look no further on this question than the findings and order of the Missouri Court * * * (R. 101). If the Missouri Court acted improvidently or reached erroneous conclusions of fact or law that was a matter to be challenged by direct appeal and not a matter for collateral consideration by the Indiana Court or by this Court. It is my judgment we must give full faith to the findings and order of the Missouri Court" (R. 102).

The so-called evidence and findings of fact has been discussed elsewhere in this Reply Brief.

The analogy asserted by the respondent between the instant case and cases cited by him relating to succession taxes (Resp. Brief, p. 18) does not exist and the same may be said of the Williams v. North Carolina case, 89 L. Ed. 1123, No. 15 Advance Sheets.

All such cases are dependent upon domicile as a prerequisite to jurisdiction and may be distinguished from the instant case upon consideration of one fundamental principle of jurisdiction, that is, the constitution of the court and the power of the constituting authority to regulate the subject matter.

No court can be vested with jurisdiction over a subject matter which is beyond the power or the authority of the power constituting the court to regulate.

In the Tilt v. Kelsey case (207 U. S. 43) the New Jersey Court, whose judgment it was sought to uphold, was constituted either by the statute or Constitution of New Jersey, and in the Dorrance case (115 N. J. Eq. 268) the Pennsylvania Court whose judgment was involved was likewise created by the laws of Pennsylvania. In the Williams v. North Carolina case the Court whose judgment was involved was a Nevada Court.

The question in each case was whether or not, in a case dependent upon domicile, the particular judgment which affected the sovereign interest of another state was res judicata and binding upon the courts of such other state, or whether such other state might, in a collateral proceeding, to which it was a party, challenge the finding, express or implied, that the deceased or the parties to the marital contract, as the case might be, was domiciled in the jurisdiction of the Court rendering the judgment. The finality of the judgment in the jurisdiction of the rendering court was not in question.

In each case also the fact obtruded that another state, New York, New Jersey, or North Carolina, respectively, asserted a personal or sovereign right or interest in the subject matter separate and apart from the interests of

the immediate parties to the suit. Neither could the parties to the suit or proceeding, culminating in the asserted judgment, be considered agents for or in privity with the several states involved and were in fact actually or potentially adverse in interest to the state.

In each case the Legislature or people in the particular state wherein the judgment was rendered had ample authority to vest a court with jurisdiction to adjudge the tax obligation or marital status, as the case might be, of persons domiciled in their respective states, but were wholly without authority to confer jurisdiction to adjudge or assess the tax liabilities of citizens of another state to such other state in a suit to which the other state had not consented or been made a party, or to adjudge the marital status of residents of any other state, in such manner as to exempt them from the police regulations of the state of their domicile.

It is true, by the Federal Constitution, which may be considered as a compact between the states, provision is made whereby the states are bound to give full faith and credit to the public acts, records and judicial proceedings of every other state (Const., Article IV, Section 1), but underlying the constitutional provision is the implied undertaking of each state to confine its public acts and judicial proceedings within proper bounds, so as not to impair the sovereignty of another state. An inherent attribute of sovereignty is the power to regulate the marital affairs and to tax persons domiciled in the state. Exemption from suit, except where it is consented to, is also an inherent attribute of sovereignty, although such exemption is not specifically reserved in the Federal Constitution.

If a state legislature should undertake to authorize one of its courts to entertain a direct suit against a sister state, without its consent, there is no doubt that a judgment rendered under such conferred power, however regular otherwise, would not be entitled to faith and credit. All because the Court undertook to adjudge a cause that did not pertain to its constitution as a court of a particular state empowered only by local authority. Likewise, it does not pertain to the constitution of the courts of one state to adjudge the marital status of citizens of another state or to authorize parties to cohabit in another state in violation of the laws of such other state, or to adjudge or discharge indirectly the tax liabilities of a citizen of another state to such other state without the consent of such other state.

Such a situation does not exist in the instant case. Here the thing involved is corporate reorganization exclusive under the bankruptcy power conferred on Congress. Only one sovereignty is involved. Both courts are constituted by Congress. Congress could confer jurisdiction in reorganization on one or several courts. It might have established an administrative agency in bankruptcy and provided for an appeal to a district court or court of appeals directly from the agency, or it might have established a special court as it did in the Price Administration Act, or as it has done in various other cases. It could establish in effect a special court of three judges and provide for a direct appeal to this Court, as in cases involving the constitutionality of state statutes, etc. Or it could have provided for a system of court administration of ordinary bankruptcy and established a special or other court or administrative board for reorganization. Or, it could do as it did in the Chandler Act: Authorize a petition for reorganization to be filed in any court of bank-

ruptcy, provided no other reorganization petition is pending by or against the corporation and, regardless of pending ordinary bankruptcy or equity receiverships, confer on the court in which the petition is filed exclusive and nationwide jurisdiction to adjudge the suit, and as an incident thereto, authorize it to adjudge its own jurisdiction, by a judgment impregnable against collateral attack.

> "Section 111. Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."
> 11 USCA 511.

And empower the Court wherein the petition is filed with authority while the petition was under consideration to enjoin ordinary bankruptcy proceedings (Section 112, 11 USCA 512), and provide that the approval of the petition should operate as an automatic stay of a prior pending bankruptcy. (Section 148.)

> Cf. Kalb v. Feuerstein, 308 U. S. 433-439, 84 L. Ed. 370-375.

Respondent asserts (Brief, p. 21) that the Indiana Court and the Missouri Court were of equal and coordinate jurisdiction. The assertion is incorrect.

Insofar as both courts are designated courts of bankruptcy with general jurisdiction to entertain either ordinary bankruptcy petitions or reorganization petitions, that statement is true in the abstract. However, to assert that they were of coordinate jurisdiction when one was entertaining a petition in ordinary bankruptcy and the other a petition in reorganization is to assert a proposition directly in the face of the statute.

As a court proceeding in ordinary bankruptcy, the Indiana Court was given no power to interfere with or stay a proceeding in reorganization while, on the contrary, a bankruptcy court proceeding in reorganization is expressly authorized to stay proceedings in ordinary bankruptcy (Sections 113, 148, 11 USCA 511-548) and is given a jurisdiction supersessive to that of all other courts, including courts of ordinary bankruptcy. Under such circumstances the jurisdiction of the court proceeding in ordinary bankruptcy is inferior and subject to the jurisdiction of a reorganization court. The jurisdictions in such case are no more coordinate than that of a Circuit Court of Appeals and a District Cou.. .- Although both judges are District Judges, they are no more coordinate than would be the case if one of the judges was sitting as a judge of the Circuit Court of Appeals and the other judge was trying a jury case.

Respondent attempts to distinguish the case of Kalb v. Feuerstine, 208 U. S. 433, 84 L. Ed. 370, cited in petitioners' original Brief, by asserting that there was no question whether or not the debtor in that case was a farmer. The ground of the decision in that case was not whether or not the judgment of the Federal Court under the Frazier-Lemke Act was supported by evidence or findings of fact, but whether or not the mere filing of a petition operated to subject the petitioners' person and property to the jurisdiction of the bankruptcy court and automatically ousted the jurisdiction of all other courts (l. c. 439), and the Court said:

> "The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone."

Consult also First National Bank v. Klug, 186 U. S. 202, 46 L. Ed. 1127, cited 254 U. S. 348, 65 L. Ed. 297.

On page 22 of his Brief respondent asserts that there was ample evidence in the record to support the Indiana Court's finding that National was not a subsidiary of Christopher.

The evidence relied upon purports to be the testimony of J. M. Brown given, not in the present proceeding but at the first meeting of creditors in National's bankruptcy proceeding on March 7, 1944, to the effect that he and A. B. Christopher owned the capital stock of National.

In the first place Brown's testimony, if he did so testify, was at the first creditors' meeting and was not competent evidence in any other proceeding or in a proceeding between petitioners Duggan and National and respondent Sansberry.

It could not have been in the nature of impeachment testimony, since Brown did not testify at the hearing on the confirmation of sale. It could not have been in the nature of a judicial admission, since, if made at all, it was made prior to the time National's petition for reorganization was filed and prior to the time when petitioner Duggan was appointed Trustee for it in reorganization. Respondent's citation is to page 6 of the Record, where the Referee incorporates under the title "Summary of the Evidence" purported testimony of Brown purporting to have been given at the first meeting of creditors. The Referee does not certify that any part of this purported testimony or the things referred to under the Summary of Evidence were offered in evidence at the hearing on the report and confirmation of sale. The pro-

ceedings on the confirmation of sale is found on page 3 of the Record and the judgment confirming the sale is based on the finding that title to the assets was in Sansberry and the assets were in the custody and control of his Court, and the report of sale should be approved on ordinary considerations.

The exhibits relied on were not in the Record before the Indiana Referee at all, nor in the Record submitted to the Circuit Court of Appeals. This definitely appears from the fact that respondent's citations are not to the official Record, which has been certified to this Court, and which does not contain the "**exhibits**" but to pages of the respondent's Brief.

We have referred to and discussed the manner in which this purported Record is presented to the Court elsewhere in this Brief. Suffice it to say that none of these exhibits were offered before the Referee or before the Judge of the Indiana Court, and the testimony of Brown, if offered at all, was not offered at the hearing involved in this appeal.

The purported findings of facts (Record citation, p. 12) were voluntarily made by the Referee after the entry of the order confirming the sale found at pages 3 and 4 of the Record and do not purport to have been made upon any evidence heard by the Referee in connection with the confirmation of sale involved in this suit. It is true that one of the Judges below (Judge Sparks) referred to and to some extent based his conclusions upon this purported testimony and upon a number of the purported exhibits incorporated by the respondent in his present Brief, which are not exhibits at all but purport to be documents selected from the files of the Missouri Court

or from the files of the Indiana Court by respondent, and stated that these "**facts**" were not disputed. They were not disputed because the petitioners had never been afforded an opportunity either to dispute or explain them. They were not offered in evidence in the lower court and the exhibits were not in the transcript certified to the Court below. They were for the first time produced by the respondent in the Court of Appeals by being inserted in his Brief or exhibited to the Court at the oral argument after our Brief was printed and filed. There is no provision made by law or rules of court whereby an issue can be raised and determined with respect to evidence irregularly offered de hors the record or whereby such evidence can be disputed or explained. An appellate court sits as a court of review and not as a court of original jurisdiction to receive and weigh original evidence.

We felt we could not complain to this Court of the use Judge Sparks made of the purported evidence, since no other Judge concurred with him in that use. Perhaps we were wrong but we felt this Court would not issue certiorari to review a minority opinion. Respondent has followed the same procedure in this Court.

C.

Respondent urges that the order of the Missouri Court had not become final on May 3, 1944, when the Indiana Court's order approving the sale was entered, and that the order was therefore subject to collateral attack in the Indiana Court (Resp. Brief, p. 25).

It is true that the order of the Missouri Court entered on April 19, 1944, was subject to direct appeal by any interested party for a period of thirty days after it was

entered or forty days dependent on whether or not notice of the order was served on the interested party within five days. Notice of the order was served on the respondent on the day after the order was entered and assuming that he was an interested party who might have attacked the judgment by direct appeal, that time did not expire until May 19th.

But the mere fact that the time for appeal had not expired did not alter the force of the order collaterally. The mere fact that the order was undoubtedly appealable itself confirms its finality, since only a final order is appealable in any event. The order not only automatically, but expressly restrained, the sale. The Court had **power** to restrain the sale even before approving the petition (Section 112, 11 USCA 512).

Regardless of the character of the order, it was final in the sense that it exhausted the power of the Court over the issues resolved by the order. Of course, procedure is established by the Act and by the Code of Civil Procedure, whereby interested parties may secure a review and obtain relief from an improvident order in the same Court, but that relief is to be had only upon application to the Court entering the order. It may not be had in a collateral court.

In a sense all orders prior to a final order approving a plan or dismissing or adjudicating the petitioner a bankrupt or remanding the cause, or reinstating a prior pending proceeding are interlocutory in their nature in the sense that in most instances they are subject to review and revision by the same Judge, but they are nevertheless res judicata and immune to collateral attack.

In re Loewers Gambrinus Brewery Co., 141 Fed. (2d) 747.

Respondent recites on page 25 of his Brief a statement of the Senate Committee on the Judiciary to the effect that Section 149 was designed to foreclose all direct or collateral attacks upon jurisdiction or venue once the period for appeal from an order approving a petition has expired and concludes Congress intended to permit a collateral attack on the order prior to the expiration of the appeal time. Of course, it is clear that the Senate Committee had in mind foreclosing attacks upon jurisdiction at all events after the time for direct attack had expired, contrary to the general rule that an order of a court may be attacked at any time in the same court on jurisdictional grounds. The Committee did not mean to modify the clear and unambiguous provisions of Section 111 (11 USCA 511), conferring upon the Court exclusive jurisdiction upon the mere filing of a petition, or the provisions of Section 148 providing that the order approving a petition shall automatically stay pending bankruptcy proceedings.

Applying respondent's construction of the law would in effect, and in any case postpone the reorganization Court's control of the debtor and its assets until the appeal time had expired, and permit the dissipation of the debtor's assets while judgment order was becoming "final."

Respondent also (p. 26) quotes Section 161 of the Act (11 USCA 561), which provides that a judge shall fix a time of hearing to be held not less than thirty days and not more than sixty days after the approval of the petition and give notice of such hearing to creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may direct. It will be noted that respondent is not of the class of persons required to be notified in any event. From the fact that

there is no showing that such notice of hearing was given respondent concludes that the judgment approving the petition was subject to collateral attack. Naturally such notice does not appear in the judgment order approving the petition, since the Act contemplates that the notice will not be given until the petition has been approved. Section 161 also contemplates that it will not be made until such time as a list of creditors is filed, since until that time the trustee is without the means or information necessary to give the notice.

But respondent does not cite Section 162, which discloses the purpose of the hearing:

> "Section 162. At the hearing required by Section 161 of this Act, or at any adjournment thereof, or, upon application, at any other time, the judge may hear objections to the continuance of the debtor in possession, or to the retention of office of a trustee upon the ground that he has not qualified or not disinterested, as provided in Section 158 of this Act." (11 USCA 562).

The purpose of the hearing described in Section 161 is not for the purpose of reviewing the propriety of the order approving the petition, hence such notice or the failure to give such notice has no effect upon the validity of the order approving the petition.

Section 137 (11 USCA 537), quoted by the respondent, provides that prior to the first date set for the hearing provided in Section 161 an answer may be filed controverting the allegations of a petition by or against a debtor by any **creditor or indenture trustee or, if the debtor is insolvent, by any stockholder of the debtor**, and Section 144 provides for the hearing and determination of the issues raised by such answer.

Again it will be noted that the respondent, Sansberry, as a trustee in ordinary bankruptcy, is not among those classes of persons authorized to controvert the allegations of a petition for reorganization, and for the very good reason that he is merely the officer of the Court, whose jurisdiction was automatically ousted by the approval of the petition, and his authority could not survive the authority of the Court which appointed him. His activities as trustee was a part of the proceeding that was automatically stayed.

At any rate, the respondent, Sansberry, was given notice of the judgment order immediately (next day), and was in a position to apply to the Missouri Court and ask for a decision on his right, if any, to controvert the allegations of the petition, or to make such other motion as he deemed proper. The fact that interested parties are authorized to intervene and defend against the petition does not imply that the judgment may be subjected to collateral attack by one who has actual notice of the proceeding.

See American Surety Co. v. Baldwin, 287 U. S. 158; 77 L. Ed. 231, discussed supra.

Respondent's discussion further, on page 27 of his brief, of the use of the word "final" in several sections of the statute proceeds on the theory that any judgment order of a Court is subject to collateral attack at any time before it becomes immune to direct attack.

The cases cited by the respondent are not germane to the issues in this case.

In Bohler v. Calloway, 267 U. S. 479, 69 L. Ed. 745, this Court merely ruled that the denial of an interlocutory

injunction against proceedings by an arbitration board upon a tax adjustment was not res judicata upon the question of whether or not the statute providing for such board had been repealed by a later statute.

The case of Santowsky v. McKey, 249 Fed. 51, cited by respondent, involved a petition to review and revise an order of a district Court and the ruling was to the effect that the previous action of the Court in overruling a motion to dissolve a temporary injunction did not constitute a final ruling on the ownership of property therein involved, or to prevent the same Court thereafter considering a petition to determine the title involved.

The case of Nardi v. Poinsatte, 46 Fed. (2d) 347, involved a suit in the District Court for the Northern District of Indiana, on a judgment rendered by the District Court for the Northern District of Illinois, on a so-called "judgment note." It was defended on the ground that the Illinois Court did not have jurisdiction of the person of the defendant Poinsatte. The Court found, for the defendant on the ground that the Illinois judgment was obtained by the plaintiff as a result of fraud upon the Court at the time the judgment was rendered and on the ground that while the note authorized "any attorney of any Court of record" to appear and confess judgment, the certified proceedings of the Illinois Court indicated that judgment was confessed by an "attorney in fact," and the certificate did not disclose that the judgment was not confessed by any one authorized so to do by the note. Therefore, it was ruled the Court was without jurisdiction (of the person) to proceed to judgment.

We have heretofore discussed the case of Williams v. North Carolina, 89 L. Ed. 1123 (Advance Sheets 1945),

and pointed out that where the issue involves a subject matter beyond the power of the authority constituting the Court to regulate as well as beyond the power of the Court to adjudge, such as domicile of non-residents in succession and divorce cases, that the Court of one state undertaking to determine that question could not block a reconsideration of the underlying jurisdictional fact by another state under the full faith and credit provisions of the Constitution. This Court in its several opinions in the Williams case did not go beyond the facts developed in that case, which indicated that the defendants in the Nevada divorce cases did not appear in Nevada and contest the jurisdiction of the Nevada Court. In passing it might be suggested, hypothetically, that an appearance and actual contest of jurisdiction by a defendant would not necessarily have barred the inherent right of North Carolina, as a sovereignty, to deal with the marital status of its domiciled citizens. It is doubtful if there is sufficient privity between the state and its citizens to bind the state by the act of a private individual. This is more obvious when we consider cases involving a succession tax. It is conceivable that citizens of one state, having possession of a will wherein they are beneficiaries, might select a jurisdiction where the succession taxes were more favorable to them and in an ex parte proceeding secure the probate of the will in such state, which if conclusive and binding on the state would defeat its legitimate tax demands. In such case it is inconceivable that the parties, adverse in interest to the state, would be held to be in such privity to the state as to bind it by an adjudication so obtained, though the parties themselves might be estopped by the judgment.

The case of Petition of Taffel, 49 Fed. Supp. 109, cited by the respondent, involved the precise point mentioned

in the preceding paragraph. It involved a so-called "Mexican consent divorce decree," and the ruling summarized in the syllabus was:

> "Although parties under New York law may be estopped from challenging validity of a foreign divorce decree by reason of being parties to collusive arrangement, the Federal Government or State would not thereby be 'estopped' from asserting invalidity of the decree."

The divorce, not being binding on the government, it was held a subsequent marriage of the husband to an alien, did not authorize her naturalization as his lawful wife.

The opinion in the case of Valley v. Northern Fire and Marine Insurance Co., 254 U. S. 348, 65 L. Ed. 297, was rendered on a petition to revise a judgment order of a bankruptcy court vacating an adjudication and dismissing the proceeding for want of jurisdiction on motion filed after the expiration of the time for appeal, and in the same court. The Court held that notwithstanding the time for appeal had expired, the Court which had adjudicated the corporation a bankrupt had authority to set aside the adjudication and dismiss the proceeding when it was made to appear that the bankrupt was an insurance company and not within that class of persons subject to the bankruptcy law.

In his discussion of the case Justice McKenna distinguished the case of First National Bank v. Klug, 186 U. S. 202, 46 L. Ed. 1127, wherein an involuntary bankruptcy petition had been filed against Klug on the theory that he was not engaged chiefly in farming and, upon a finding that he was engaged in farming, the Court entered

a judgment dismissing the petition, and the question of jurisdiction was certified to the Supreme Court, and this Court said:

> "The conclusion was, it is true, that Klug could not be adjudged a bankrupt; but the court had jurisdiction to so determine, and its jurisdiction over the subject matter was not and could not be questioned."
>
> Citing: Mueller v. Nugent, 184 U. S. 15, 46 L. Ed. 411, and other cases.

The Klug case is applicable to this case. There was no question that the debtor, National, was a corporation and, of a class which might petition for reorganization. Upon filing the petition in the Missouri Court which had general jurisdiction to entertain such petitions, the Court, regardless of whether it on the merits approved or dismissed the petition, became vested with jurisdiction over the subject matter and such jurisdiction could not be questioned collaterally.

D.

Respondent asserts that the judgment of the Missouri Court was not res judicata as against the respondent because the respondent was never before the Missouri Court.

If that assertion is true as to the respondent, then it is true as to every creditor and every other person interested in any reorganization proceeding, and to every trustee or receiver, conventional or judicial, since voluntary petitions are always heard and determined without notice to creditors or other parties and involuntary petitions are heard and determined only on notice to the alleged debtor. If decrees adjudicating parties bankrupt or approving petitions for reorganization were dependent

for validity upon prior notice to creditors and other parties, then bankruptcy or reorganization in any case would be impracticable.

In the case of Hanover National Bank v. Max Moyses, 186 U. S. 181, 46 L. Ed. 1113, this Court sustained the validity of an adjudication in bankruptcy on a voluntary petition. The Hanover Bank was a creditor of Moyses domiciled in another state and was not a party to the proceedings in bankruptcy and did not enter its appearance therein for any purpose, nor did it prove its claim or in any way subject itself to the jurisdiction of the District Court in the proceedings. It was not served with process of any kind on said petition for adjudication and had no notice, personal or otherwise, of the said proceeding by voluntary petition for adjudication and no notice was given to it or any other person on its behalf in the proceeding. Subsequently the Bank brought suit against Moyses in the United States Court for the Eastern District of Tennessee and challenged the constitutionality of the Bankruptcy Act on the ground it violated the Fifth Amendment since it did not provide for service of process upon or personal notice to creditors. This Court, in an opinion by Chief Justice Fuller, examined the validity of the proceeding and of the statute and said (l. c. 192):

> "Service of process or personal notice is not essential to the binding force of the decree."

The cases of Aspen v. Nixon, 4 How. 467, 11 L. Ed. 1059, and Troxell, etc., v. Delaware L. & W. Railway, 227 U. S. 433, 57 L. Ed. 586, have no application to the instant case.

In the case of American Surety Company v. Baldwin, 287 U. S. 158, 77 L. Ed. 231, heretofore cited by us, and

again cited by the respondent on page 29 of his Brief as authority for the proposition that the Missouri judgment was not binding upon the respondent because he had not been served with process. it appeared that a judgment had been rendered against the Surety Company in favor of the defendants Baldwin in the State of Idaho on an appeal bond executed by the Surety Company upon an appeal by the Singer Sewing Machine Company. Failing in its appeal, judgment was entered against the appellant and the Surety Company without notice to either under the Idaho practice. The attack against the judgment was based upon the theory that the law under which judgment was rendered against the surety without notice was in violation of the Fourteenth Amendment.

This Court on that phase of the case held that the state practice which provided for an appeal by the surety after the entry of judgment satisfied the due process provisions of the Constitution. The Court said:

> "Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment" (citing cases). l. c. 168.

The respondent had notice of the judgment, and, if he had an interest which was impaired by the judgment, had his remedy by application to the Court and by direct appeal.

The other cases cited by the respondent have been discussed in our original Brief or are irrelevant.

II.

A-B.

We have discussed in our original Brief the construction of the statutes relating to venue and the authority of the Missouri Court to entertain and adjudicate with finality as against collateral attack the petition of National.

Insofar, however, as the respondent discusses in that connection the question of transfer of proceedings under the General Orders of this Court, it is sufficient to point out that no order or provision is made for the transfer of an ordinary bankruptcy proceeding to another district and to a court which did not have jurisdiction, by reason of the domicile or place of business of the bankrupt, to have entertained a petition in ordinary bankruptcy by or against the bankrupt.

Transfers of ordinary bankruptcy are regulated by Section 32 of the Act (11 USCA 55) and transfers are limited "to cases in which two or more petitions are filed by or against the same person in different courts of bankruptcy, **each of which has jurisdiction.**" General Order 6 (11 USCA following Section 53) is identical with Section 32 of the Act.

The provision for the transfer of ordinary bankruptcies is limited to cases where both courts had jurisdiction and in the case of ordinary bankruptcies that jurisdiction is limited to jurisdictions wherein the bankrupt had its principal place of business or resided or been domiciled for the preceding six months, or to aliens who have property within the District, since under Section 2 (a) (1) of the Act [11 USCA 11 (a) (1)] the power of a court to adjudge one a bankrupt is limited to the persons designated.

The power of a reorganization court to transfer, however, is regulated by Section 118 (11 USCA 518) and the Judge is authorized to transfer a proceeding under Chapter X to a court of bankruptcy in any other district, regardless of the location of the principal assets of the debtor or its principal place of business, if the interests of the parties will be best served by such transfer.

The words "petition" and "each of which has jurisdiction" appear in Section 32 and General Order 6, but must be read in the light of the provisions of the several chapters constituting a part of the Chandler Act. In Chapter X a petition is defined as a petition proposing that a plan of reorganization be effected under Chapter X, while in Section 32 the petition referred to is a petition to be adjudicated a bankrupt.

If General Order 6 and Section 32 are transferred bodily to Chapter X and read as a part thereof, then General Order 6 and Section 32 in their application to reorganization proceedings must be interpreted in connection with the interpretation of petition as found in Chapter X, which defines petition as "a petition filed under this chapter * * * proposing that a plan of reorganization be effected."

Section 106 (13) [11 USCA 506 (13)].

Therefore, General Order 6 and Section 32, insofar as applicable to Chapter X, must be interpreted to mean that if two petitions for reorganization are filed or are pending in different courts, as a result of which two or more courts would have jurisdiction to grant the relief sought, then the first court acquiring jurisdiction of one of such petitions (for reorganization) is authorized to provide for the transfer or consolidation of causes.

Since the General Orders are not designed to modify but only to carry into execution the provisions of the statute, they must not be interpreted in such manner as to conflict with the statute or to confer or take away a right contrary to the provisions of the statutes involved

Meek v. Center County Banking Co., 268 U. S. 426, 69 L. Ed. 1028.

Respondent, on page 38 of his Brief, suggests that both reason and authority support the view that a petition for reorganization should be filed in the same forum in which a bankruptcy proceeding is pending.

In support of that proposition he urges that one of the prerequisites to approval of the petition is that it must have been filed in good faith—Section 141 (11 USCA 541), and recites further: The Court in which those prior proceedings are pending **may** be the Court best able to determine whether the interests of creditors and stockholders can be served by reorganization or by liquidation.

Clearly, the question of whether or not the petition is filed in good faith is to the merits and is a question to be determined by the Court in which the reorganization petition is filed. An error of fact in determining that issue would not oust the jurisdiction of the Court.

The suggestion of the respondent that the Court in which prior bankruptcy proceedings are pending may be Court best able to determine that issue does not go to the jurisdiction of the Court, but simply to the wisdom and judgment of Congress in enacting Section 126 (11 USCA 526), which authorizes a corporation to petition for reorganization, subject only to the condition that no other petition is pending by or against it under Chapter

X and to the provisions of Section 129 (11 USCA 529), which confers upon a subsidiary an unconditional option to file a petition for reorganization "in the court which has approved the petition by or against its parent corporation."

Respondent's suggestion that it would be better if the subsidiary was required to file a reorganization petition in the ordinary bankruptcy proceeding pending against it is directed to the wrong forum. It should be directed to Congress, where such matters of policy are determined.

Likewise, respondent's suggestion that a literal interpretation of Sections 126 and 129 would result in a shuttling back and forth of the assets between an ordinary bankruptcy court and a reorganization court in the event the petition for reorganization was approved and ultimately dismissed should be directed to Congress.

C.

Respondent urges that Section 129 is far more than a mere venue statute and that it is jurisdictional in its nature.

We have discussed this question in our original Brief, but respondent (Brief, p. 41) has confused, possibly the error is typographical, the sections conferring jurisdiction on bankruptcy courts to receive petitions and adjudge persons bankrupt in ordinary bankruptcy proceedings and the sections conferring jurisdiction on bankruptcy courts to receive and adjudge petitions for reorganization. As a result of such confusion respondent states that the jurisdiction of bankruptcy courts to receive petitions for reorganization is defined in terms of venue.

As pointed out in our original Brief (pp. 24 et seq. and 46 et seq.), after defining courts of bankruptcy as including district courts of the United States, jurisdiction is granted under Section 2 (a) and numerous sub-sections of Chapter II. And there is a clear distinction between the jurisdiction of courts in proceedings in ordinary bankruptcy and in proceedings under the reorganization provisions.

The jurisdiction of bankruptcy courts to adjudge persons bankrupt is limited by sub-section (1) of Section 2 (a) [11 USCA 11 (1)] **to persons generally who have resided in or had their principal place of business or assets within the respective territorial jurisdiction of the court for a period of six months preceding the petition in bankruptcy.** No such territorial limitation, however, is placed upon the jurisdiction of bankruptcy courts in reorganization proceedings. Under Section 2 (a) (9) such courts are conferred with such jurisdiction as will enable them **to confirm or reject arrangements or plans proposed under this Act, setting aside confirmations of arrangements or wage earner plans and reinstate the proceedings and cases.** And, as heretofore pointed out, subsidiary corporations are expressly authorized by Section 129 (11 USCA 529) to petition for reorganization in the court which has approved its parent's petition.

D.

On page 45 of his Brief respondent reiterates the argument that the judgment order of the Missouri Court was subject to collateral attack until it had become immune to direct attack.

This question has been heretofore considered.

III.

A.

Under subhead III (Resp. Brief, p. 43) **the respondent urges that the Indiana trustee in ordinary bankruptcy was an adverse claimant to the property of the National, hence the reorganization court in Missouri had no jurisdiction in a summary proceeding to adjudge possession of the property to the reorganization trustee or to enjoin respondent from selling the property.**

The argument might be sound if the respondent was in good faith asserting an adverse title, but even in that case the Missouri Court would have had jurisdiction to determine whether or not the claim of the respondent was actual or only colorable.

Respondent, however, had no title whatever which would survive the jurisdiction of the Indiana Court; survive his removal as trustee or survive a judgment of a reorganization court superseding the jurisdiction of the court which appointed him.

The respondent concededly had no title except as an agency of the Indiana Court for the purpose of carrying into effect the provisions of the Chandler Act relating to ordinary bankruptcy.

As trustee in ordinary bankruptcy he for certain purposes represented all the parties interested in the ordinary bankruptcy, including creditors, but he did not represent creditors for the purpose of reorganization. He was not described in Section 137 (11 USCA 537) as a person who might file an answer controverting the allegations of a petition for reorganization by or against a debtor. Nor was he described in Section 161 as a person who

should be given the notice of hearing prescribed by Section 161 for the purpose of hearing objections to the qualifications of the debtor in possession or of the trustee."

Respondent concedes in effect that had the petition for reorganization been filed in the Indiana Court to which he owed his appointment, that the approval of the petition by that Court would have automatically stayed the pending proceedings in ordinary bankruptcy and upon the appointment of a reorganization trustee or upon the restoration of the possession to the debtor the respondent would have been ousted of his possession. Does he contend in that case that he would have been entitled to appear in the reorganization proceedings and controvert the allegations of the petition or litigate the order appointing his successor and appeal from an adverse ruling? Certainly he would have that right if he had a substantial adverse interest in the property, or a property right in his office, yet such a procedure would be absurd. The answer is that the respondent had no interest in the subject matter or property right in his office of which he might not be divested summarily and without notice, either by the Missouri Court or by the Court which appointed him receiving and adjudging a reorganization petition. Upon the happening of that event his title and right to possession terminated ipso facto and without the right to appeal or protest. That contingency was an incident to his office.

The respondent's custody and title were certainly not more substantial than the title of a trustee in possession under a trust deed or mortgage or that of an indenture trustee in possession, yet reorganization trustees, or a debtor if continued in possession, immediately becomes seized with the rights, if any, of a prior receiver or

trustee and with the right to the immediate possession of the property (Section 257, 11 USCA 657) and Section 657 is constitutional.

Clark Bros. Co. v. Portex Oil Co., 113 Fed. (2d) 45.
In re Park Beach Hotel Bldg. Corporation, 96 Fed. (2d) 886.
In re Grayling Realty Corporation, 74 Fed. (2d) 734.
Kalb v. Feuerstine, 308 U. S. 433-439.
Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 84 L. Ed. 110.
Warder v. Brady, 115 Fed. (2d) 89.
And the cases cited and discussed in our original Brief, pp. 14, 18, 19.

IV.

Under subhead IV, page 46, respondent asserts that the petitioners were estopped by their conduct and course of action in the Indiana bankruptcy proceeding from questioning the jurisdiction of the Indiana Court.

This argument is based on the assertion that petitioner Duggan and J. M. Brown had appeared in the Indiana Court personally and by their attorneys and failed to question the jurisdiction of the Indiana Court and both parties acquiesced fully in its actions until the very eve of the sale.

Suffice it to say that the purported appearance of Duggan, by counsel, was on January 25, 1944 (R. 7), was some three months before the National petition was filed in the Missouri Court and a like period of time before Duggan was appointed trustee in reorganization for National. His appearance was on behalf of Christopher Engineering Company. Even if his appearance had been on

behalf of the National Aircraft Corporation, or if the National Aircraft Corporation itself had appeared, the National would not have been estopped, nor could it have estopped creditors of National from filing a petition for reorganization wherever it was authorized by law to file it.

In the case of Brooklyn Trust Co. v. Rembaugh, 110 Fed (2d) 838, the Second Circuit held a debtor's petition was not filed in good faith since it was seeking to escape the jurisdiction of the state Court to which it had voluntarily submitted itself.

In the case of Marine Harbor Properties, Inc. v. M. F. R. S. Trust Co., 317 U. S. 78, 87 L. Ed. 64, this Court referring to the Brooklyn Trust Co. v. Rembaugh case:

> "But that is not the test which Congress has provided in Section 146 (4) [11 USCA 546 (4)]. That provision requires the bankruptcy Court to inquire whether 'the interests of creditors and stockholders' would be better subserved in the prior proceedings or under Chapter X. That the desire of petitioner to escape the prior proceedings is immaterial to that inquiry is supported not only by the language of Section 146 (4), but also by the fact that Section 256 expressly sanctions the filing of petitions under Chapter X, although prior proceedings are pending. To disqualify a petitioner under Chapter X merely because he had in some way participated in the prior proceeding would effect a substantial impairment of Section 146 (4), since it would be the exception rather than the rule where both the debtor and the creditors had not taken some part in the prior proceedings. Furthermore, the issue as to the adequacy of the prior proceedings, as compared with Chapter X, is the same whether the petition is filed by creditors or by the debtor" (l. c. 85).

B.

The respondent urges as an element of estoppel the alleged fact that in reliance on the representations and acquiesence of Duggan, Trustee, and J. M., Brown he had spent several thousand dollars in preserving the assets of the National Aircraft Corporation.

That constitutes no consideration, nor is it an element of estoppel. The costs, if any were expended, are chargeable to the fund and even the bankruptcy trustee's compensation is preserved to him in the reorganization proceeding.

CONCLUSION.

We respectfully suggest that the judgment of the Court below ought to be vacated and set aside with instructions to the lower Court and the respondent Trustee to conform themselves to the judgment of the Missouri Court in accordance with the provisions of Chapter X of the Chandler Act authorizing that Court by its judgment order to centralize in itself, for the purpose of reorganizatoin, all the assets and control of the debtor and its assets and the settlement with finality and effect of the numerous questions that will arise on reorganization.

Respectfully submitted.

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